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No. 89-924

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

DAVID P. GOULD, et al.,

Petitioners,

v.

ALLECO, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS LEONARD AND PATRICIA ROBINSON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This Petition concerns the settlement of a securities fraud class action suit brought on behalf of purchasers of the common stock of Allegheny Beverage Corporation during the period May 14, 1985 through June 30, 1986 (*Robinson* litigation). Petitioners, holders of debentures of the corporation, objected to the settlement and attempted to intervene in the *Robinson* litigation. The District Court denied the motion to intervene, held that Petitioners had no standing to object and approved the settlement. The Court of Appeals for the Fourth Circuit affirmed.

The Petition presents two questions for review. They are as follows:

1. Did the District Court err in holding that Petitioners, who were not members of the class, had no standing to object to the settlement?

2. Did the District Court abuse its discretion in denying Petitioners' motion to intervene in the *Robinson* litigation?

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Pursuant to Rule 22 of the rules of this Court, Respondents, plaintiff class representatives in the Courts below, file this brief in opposition to the Petition for a Writ of Certiorari which seeks to overturn a decision of the Court of Appeals for the Fourth Circuit. It is requested that this Court deny the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

In their complaint, filed on July 23, 1986 in the United States District Court for the District of Maryland, Leonard and Patricia Robinson sought to maintain a class action on behalf of all persons who purchased the common stock of Allegheny Beverage Corporation ("Allegheny")[1] from May 14, 1985, to June 30, 1986. The complaint alleged that plaintiffs and the class sustained damages as a result of Allegheny's fraudulent misconduct in violation of §10(b) of the Securities Exchange Act, Rule 10b-5 promulgated thereunder, and common law principles of fraud and deceit. *Robinson v. Allegheny Beverage Corporation* (hereinafter *Robinson*).

After the disposition of numerous motions, completion of extensive discovery, and the successful consummation of long-term, arms-length settlement negotiations, the parties, on May 17, 1988, entered into a Stipulation of Settlement providing for the payment of $6,950,000 to the class. Judge Frederic Smalkin preliminarily approved the settlement by Order entered the same day and fixed September 6, 1988 as the hearing date to consider the fairness, reasonableness and adequacy of the proposed settlement and the dismissal of the litigation.

In accordance with the May 17, 1988 Order, notice of the hearing date, together with claim and release forms, was mailed to class members on or about June 21, 1988 and a summary notice of the hearing was published in the national edition of the June 28, 1988 *Wall Street Journal*.

Although no class member voiced any objection to the Stipulation of Settlement, Petitioner Lawrence I. Weisman, (hereinafter "Weisman") on August 1, 1988, (the last allowable day), filed an Opposition of Bondholders to the Proposed Settlement.

From the face of his objection, it was clear that Weisman was not a member of the class. By Order dated August 4, 1988, Judge Smalkin invited the filing of responses to the

1. During the course of this litigation, Allegheny Beverage Corporation changed its name to Alleco, Inc.

Weisman objection by any party on or before August 12, 1988. Weisman was to file a reply, if he desired to do so, by August 19, 1988. Plaintiffs and defendants filed their responses on August 12, 1988, pointing out, *inter alia*, that Weisman had no standing to make such an objection. Weisman filed no reply.

On August 15, 1988, Weisman, acting as both an attorney and one of the parties, filed with the United States District Court for the District of Maryland, a complaint consisting of one-hundred two pages and literally thousands of pages of exhibits. The thrust of this complaint, other than the pursuit of a personal grudge against Morton Lapides, Chief Executive Officer of Allegheny, was difficult to ascertain. However, the requested relief seemed to focus on a then-current tender offer for Allegheny stock and a desire to hold Allegheny executives personally liable for a number of claims. *Gould v. Alleco, Inc.* (hereinafter *Gould*).

In addition, on August 15, 1988 a motion for the appointment of a receiver was filed in the *Gould* action. In this motion, as in the *Gould* complaint, there was no request for specific relief addressed to the *Robinson* action or the settlement therein. Nonetheless, in an understandable abundance of caution, Judge Smalkin, on August 24, 1988, notified all parties to both the *Robinson* and *Gould* actions that "[a]ny requests for preliminary injunctive relief pertaining to the proposed *Robinson* settlement" would be heard at the hearing previously scheduled for September 6, 1988.

On Friday, September 2, 1988, a one hundred fifty-five (155) page First Amended Complaint was filed in the *Gould* action. This complaint reiterated, in even more expansive fashion, many of the same charges as the original complaint, with one notable exception. The amended complaint sought to enjoin the *Robinson* settlement (Count XIII).

On Tuesday morning, September 6, 1988, (Monday, September 5 was Labor Day), the parties convened for the long-scheduled hearing on the *Robinson* settlement. To their surprise, they saw, for the first time, the amended *Gould* complaint. Even more egregious was the discovery that on that

very morning, Weisman and two other *Gould* plaintiffs, (Marks, Inc. and Patrick L. Day), had filed, in the *Robinson* action, a Motion for Intervention and Delay of Settlement.

At the hearing on the settlement, counsel for Weisman and the other *Gould* plaintiffs were unable to state whether any of the parties which they represented was a member of the class but, instead, argued that the fact that some of those parties were bondholders gave them standing to challenge the settlement. However, counsel for Weisman and the other *Gould* plaintiffs were totally unprepared to address the issues which had been raised by the flurry of untimely filings.

Further, when the District Court asked counsel for the *Gould* plaintiffs to proceed with respect to any injunctive relief requested in the *Gould* action as it related to the *Robinson* action, they responded that they were not prepared to do so at that time.

The District Court denied the motion to intervene, approved the settlement and mooted the request for injunctive relief in the *Gould* complaint insofar as it related to the *Robinson* settlement. The *Gould* plaintiffs, including Weisman (hereinafter "Petitioners"), appealed these Orders in both the *Robinson* and *Gould* actions.

By opinion dated August 16, 1989, the Fourth Circuit unanimously affirmed the Order of the District Court. It determined that non-class members have no standing to object to a class action settlement pursuant to Federal Rule of Civil Procedure 23(e). In addition, it held that the District Court did not abuse its discretion in finding that Petitioners could not satisfy the "interest" requirement of Federal Rule of Civil Procedure 24(a) and that the motion to intervene was not timely filed in any event. On September 8, 1989 the Fourth Circuit denied a Petition for Rehearing.

REASONS FOR DENYING THE WRIT

Nothing in the Petition supports the granting of a Writ of Certiorari, and none of the points raised by Petitioners is worthy of review. Far from attempting to delineate the issues

that make this case one of jurisprudential importance, the Petition simply reiterates the arguments raised by Petitioners below concerning the merits of the District Court's denial of the motion to intervene and attempt to object to the Settlement.

First, the Petition raises no important, unsettled questions of federal law. As set forth in the Opinion of the Court of Appeals, the denial of intervention was not based on a controversial or disputed legal standard but rather on the facts of this case. In addition, as noted by the Court of Appeals in its Opinion, cases involving objections to a class action settlement by non-class members "are few".

Second, no conflict among the Circuit Courts of Appeals is presented by the Decision of the Fourth Circuit. No court has ever allowed a non-class member to object to the settlement of a class action pursuant to Federal Rule of Civil Procedure 23(e). Further, there is complete agreement among the courts as to the standards necessary for intervention pursuant to Federal Rule of Civil Procedure 24(a).

Finally, this case clearly is not one in which the Court of Appeals sanctioned a departure from the accepted and usual course of judicial proceedings, and therefore the exercise of the Supreme Court's supervisory power is unwarranted.

I. THE PETITION RAISES NO IMPORTANT UNSETTLED QUESTIONS OF FEDERAL LAW

The criteria used by both the District Court and the Court of Appeals in determining whether Petitioners should be allowed to intervene in the *Robinson* litigation are so universally accepted that Petitioners do not challenge their use. Even a cursory review of the opinion of the Court of Appeals illustrates that its affirmance of the denial of intervention involved no question of federal law, important or not. As the Court stated, after holding that non-class members are not automatically barred from attempting to intervene in the settlement proceedings of a class action:

> "It is, rather, on the facts of this case upon which our decision rests." (Appendix B-15).

Thus, Petitioners are reduced to arguing that a Petition for Certiorari is appropriate because, based on the facts of this case, the Court of Appeals was wrong in concluding that the District Court did not abuse its discretion when it denied Petitioners the right to intervene in *Robinson*.

The holding, by the Court of Appeals, that non-class members have no standing to object to a settlement of a class action pursuant to Federal Rule of Civil Procedure 23(e) cannot be classified as an important unsettled question of federal law. It is hardly appropriate to term the issue unsettled when not one court has ever accorded a non-class member standing to object to a class action settlement. That this should be the state of the law is not surprising. As was stated by the Eighth Circuit in *Jenson v. Continental Financial Corp., 591 F.2d 477, 482 n. 7 (8th Cir. 1979):*

> The trustees for the bankrupt also contend that Fed.R.Civ.P. 23(e) requires that the security interest be voided as detrimental to the rights of the general creditors of the bankrupts and of the former class members who chose to opt out and maintain their own action. The purpose of Rule 23(e), which prohibits class actions from being dismissed or compromised without court approval, is to protect the rights and interests of absent class members. Opt-outs and general creditors are not members of the class and hence are not entitled to the protection of Rule 23(e). Wright & Miller, *Federal Practice and Procedure*, §1797 (1977); Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970); Kusner v. First Pennsylvania Corp., 74 F.R.D. 606 (E.D. Pa. 1977), aff'd. 577 F.2d 726 (3rd Cir. 1978).

Further, the question is clearly not important. Cases where non-class members attempt to object to class action settlements are, fortunately, few. In addition, given the fact that such people can, if they meet the requirements of Federal Rule of Civil Procedure 24(a), intervene and protect their interests, there is obviously no importance to the question or widespread impact from the decision.

Accordingly, the Petition presents no important unsettled questions of federal law.

II. NO CONFLICT AMONG THE CIRCUITS IS PRESENTED BY THE PETITION

Given the fact that intervention under Federal Rule of Civil Procedure 24(a) was denied on the facts of this case rather than on an issue of law, there can be no argument that the decision of the Court of Appeals on this issue is in conflict with the decision of any other Circuit.

Although it is not clear, Petitioners' memorandum seems to suggest that the decision of the Fourth Circuit is in conflict with cases decided by three other Circuits. However, a review of each of these cases illustrates that it is inapposite or, in actuality, supports the conclusion that non-class members have no standing to object to a class settlement under Federal Rule of Civil Procedure 23(e). In *In re The Pittsburgh and Lake Erie Railroad Company Securities and Antitrust Litigation*, 543 F.2d 1058, 1067 (3rd Cir. 1976), Irving Trust Company objected, as a pledgee of stock, to the settlement of a series of class shareholder derivative actions. The Third Circuit, in holding that Irving had standing to object, emphasized Irving's status as a pledgee which has the same ability to protect its equity as does any holder of stock, including its own pledgor:

> "It is the general rule, as well as the generally preferred view, that a pledgee of stock, whether or not that stock has been registered in the pledgee's name on the books of the corporation, has the same right to protect his stockholder's equity as does a pledgor . . .the only sound federal rule is that a pledgee of stock has standing both to assert a Rule 23.1 derivative claim and to object to a settlement of that claim."

Thus, it was Irving's status as someone who "stood in the shoes" of a class member which gave it standing to object to the class settlement.

In *Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985), a

class action had been brought by purchasers of distributorships of a nationwide pyramid marketing scheme. At or about the time of the instigation of the class action lawsuit, the class members located in California became the beneficiaries of a multi-million dollar state court judgment obtained by the California Attorney General. Pursuant to that judgment, a trustee, (David Sylva), was appointed to administer the fund. Subsequently, activities in the class action and its eventual settlement adversely affected the payments to be made into the California Fund. Under these circumstances, in a decision of the Court of Appeals previous to the one cited by Petitioners, Sylva was held to be a real party in interest pursuant to Federal Rule of Civil Procedure 17(a), and to have standing to challenge the settlement. *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir. 1980). Unlike the case *sub judice*, Sylva was representing the interests of members of the class who had conflicting interests with Lead Counsel and other class members. Here, Petitioners are not members of the class and can make no such claim.

Finally,[2] in *In re Equity Funding Corporation of America Securities Litigation*, 603 F.2d 1353 (9th Cir. 1979), Petitioners point to the fact that debenture holders were held to have standing to object to the settlement therein. What they do not seem to understand is that there existed in that litigation a class of debenture holders whose class representatives objected to the plan of allocation set forth in the proposed settlement. *It was as members of the class whose claims were being settled that debenture holders had standing.*

Accordingly, the Petition presents no conflict between the Circuits requiring a resolution.

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2. *SEC v. Flight Transportation Corp.*, 699 F.2d 943 (8th Cir. 1983), also cited by Petitioner, was decided under Federal Rule of Civil Procedure 24(a) based on the factual record present therein. It is not suggested by Petitioners that the standards for intervention enunciated by the Eighth Circuit were in conflict with those set forth by the Fourth Circuit in the case *sub judice*.

III. THE FOURTH CIRCUIT DID NOT SANCTION A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS

No exercise of this Court's supervisory powers is called for in this case because, as the Fourth Circuit recognized, the District Court treated the Petitioners' objection and motion to intervene in a thorough and altogether appropriate manner.

Respondents believe that the District Court properly considered Petitioners' arguments; found that they had no standing to object to the settlement; that, based on the facts *sub judice*, intervention was inappropriate; and that the settlement should be approved without delay. Petitioners disagree. However, Petitioners' reargument in this Court of the merits of those decisions can in no way cast suspicion on the District Court's conduct of the hearing or its ultimate decisions.

The District Court was faced with a determined attempt to derail a significant settlement of a hard-fought securities class action by non-class members. As the record illustrates, from the outset, the District Court gave Petitioners every chance to substantiate their position. They consistently refused to do so. For example, despite the fact that the motion to intervene was not filed until the morning of the settlement hearing, the District Court afforded Petitioners the opportunity to illustrate their right to intervene, as can be seen by the following colloquy which appeared at pages 8 through 10 of the hearing transcript:

> THE COURT: All right. Tell me how the bondholder has standing to intervene then, because I certainly don't think the law tolerates people who are members of the same class coming in in a disorderly fashion to interrupt a settlement proposal as to which they have plenty of time to file orderly objections and exceptions, and you can't have two classes at the same time. The law will not permit that under Rule 23. Gould has not been certified, and to the extent they seek certification and they represent exactly the same class, the law will not tolerate two

class actions being litigated at the same time by different attorneys for the same class, not that I have ever seen.

MR SCHMIDT: I think you are correct, but with respect to bondholders I believe we have a separate position.

THE COURT: How do the bondholders have standing to challenge the settlement?

MR. SCHMIDT: The bondholders have claims which under the complaint would exceed the amount of the Alleco funds available.

THE COURT: Exceeds the amount of the Alleco funds available? What are you talking about?

MR. SCHMIDT: The bondholders' standing has to do with a competitive claim in the property before the Court, that is, the settlement funds and the total funds of Alleco, Incorporated, and bondholders seeking to intervene to protect what would be a superior claim.

THE COURT: Have you found any law that recognizes the right of a creditor or the holder of a debt instrument, which is basically a creditor, to intervene with regard to a proposed class action shareholder suit settlement?

MR. SCHMIDT: Within the limited time available I believe we have pointed to the Court at least two cases reflecting the general principle that if you have a readily identifiable interest in the funds—

THE COURT: That is not the question I asked you. This is not in rem litigation. I asked you if you have any authority that recognizes the right of a creditor, whether trade creditor or general creditor or holder of a debt, to intervene with regard to a settlement of a shareholder class action.

MR. SCHMIDT: Your Honor, I believe the principle applicable applied in the two cases cited to the Court would apply to that situation as well.

THE COURT: What are the facts of those two cases?

MR. SCHMIDT: I am not positive. I have not had a chance to read them over the weekend.

THE COURT: Anything else you want to say?
MR. SCHMIDT: No, Your Honor.

CONCLUSION

Petitioners have not even attempted to demonstrate an important issue of unsettled federal law, a conflict between the Circuits, or a departure from the accepted and usual course of judicial proceedings. As the foregoing memorandum illustrates, if Petitioners had attempted to do so, they would have failed. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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